CC

Art. 2 CC: Acting in good faith and the prohibition of manifest abuse of rights

Function and structure of the provision

Art. 2 CC contains two distinct rules. Paragraph 1 requires every person to act in good faith when exercising rights and performing obligations; paragraph 2 denies legal protection to the manifest abuse of a right **Art. 2 CC**. The text has stood unamended since the Civil Code entered into force on 1 January 1912, so no temporal question arises for the provision itself.

The two paragraphs work differently. Paragraph 1 is a positive standard of conduct. Courts use it to interpret declarations, to derive ancillary contractual duties, to ground pre-contractual and trust-based liability and to supply the hypothetical will of the parties when a contract is adapted. Paragraph 2 is a corrective. It lets the court refuse protection to a right that formally exists, where enforcing it in the particular case would produce flagrant injustice. The Federal Supreme Court describes paragraph 2 as a corrective "emergency device" ("korrigierender \"Notbehelf\"") for cases where formal law would lead to materially flagrant injustice **5A_782/2025**. The Lucerne cantonal court traced the "Notausgang" (emergency exit) image back to the Federal Council's message on the Civil Code (BBl 1904 IV 14) **3B 16 29**.

The courts give the prohibition of abuse a reach well beyond the Civil Code. As a general legal principle it applies "throughout the legal order including public law and procedural and enforcement law" ("in der ganzen Rechtsordnung mit Einschluss des öffentlichen Rechts sowie des Prozess- und Vollstreckungsrechts") **5A_782/2025**. The Federal Insurance Court called Art. 2 CC a "Grundschutznorm" (basic protective norm) serving public order and morality, valid across the entire legal order **BGE 131 V 97**. Its consequences in international cases are discussed under mandatory application below **4C.36/2000**.

Good faith as a standard of conduct (para. 1)

Interpretation under the reliance principle

When the parties' actual common intent cannot be established, the court interprets their declarations objectively: it asks what meaning each party "could and should reasonably give, according to the rules of good faith, to the other's declarations of intent" ("que, d'après les règles de la bonne foi, chacune d'elles pouvait et devait raisonnablement prêter aux déclarations de volonté de l'autre") **BGE 144 III 93**. That objective meaning binds a party even if it does not match his or her inner will. In BGE 144 III 93 the cantonal court had only looked for actual intent. The Federal Supreme Court applied the reliance principle itself and upheld the finding that a money transfer was a gift **BGE 144 III 93**.

Normative interpretation is subsidiary. Once actual intent is established, whether as factual agreement or as open dissent, recourse to the reliance principle is excluded **4A_643/2020**. In that case a proven oral agreement to continue monthly payments of CHF 20,000 defeated the claim to recover them **4A_643/2020**. Cantonal practice applies the same test. The Ticino court asks how a correct and reasonable person acting in good faith would have understood the declaration, and on that basis classified CHF 12,000 paid for a motorcycle as a loan **12.2022.9**.

Ancillary duties of protection, information and loyalty

Paragraph 1 makes ancillary duties part of the contract without any declaration of will by the parties. The Federal Supreme Court derives them from the duty under Art. 2 CC of comprehensive consideration and loyal conduct **4A_403/2025**. In that decision the landlords' bad-faith challenge to and termination of the leases breached such duties; the Court placed the breach under Art. 97 CO read with Art. 2 para. 2 CC and upheld damages of CHF 400,000 **4A_403/2025**. The older leading example is the cableway operator. It follows from good faith that "der Schuldner alles tun muss, um die richtige Erfüllung der Hauptleistung und die Verwirklichung des Leistungserfolgs zu sichern" (the obligor must do everything to secure proper performance of the main obligation and achievement of its result). Securing the ski runs therefore became a contractual ancillary duty of the transport contract **BGE 113 II 246**.

The duties have limits. In negotiations each party must in principle look after its own interests. A duty to inform that the law does not provide for requires special circumstances creating justified reliance: a landlord need not disclose that agreed advance payments will probably not cover the ancillary costs **4A_339/2018**. During performance, too, the scope depends on what is reasonable. In 4A_494/2010 a client's ancillary duty covered only larger, recognisable obstacles. Requiring a search of a cornfield for small metal parts would have been disproportionate and unreasonable, so the contractor's damages claim failed **4A_494/2010**.

Culpa in contrahendo and trust-based liability

Pre-contractual liability rests on the idea that opening negotiations already creates a legal relationship. That relationship obliges the parties to negotiate seriously and in line with their real intentions **4A_55/2019**. Freedom of contract nevertheless lets each party break off at any time, even without reasons, and liability for breaking off is admitted only exceptionally **4A_55/2019**. BGE 140 III 200 locates the wrong precisely: it "does not lie in breaking off, but in having kept the other party convinced that the contract would be concluded" ("non risiede nell'interruzione, ma nell'aver mantenuto la controparte nel convincimento che il contratto sarebbe stato concluso") **BGE 140 III 200**. The damage recoverable is the negative interest **BGE 140 III 200**.

Form requirements raise the threshold. Because form rules exist precisely to protect the parties from being bound, culpa in contrahendo is all the less readily admitted where the contemplated contract requires a notarial deed **4A_55/2019**. In 4A_55/2019 the parties had not agreed on the duration of a building right and no exclusivity had been promised, so either side could still withdraw **4A_55/2019**. Even so, it remains contrary to good faith to agree unreservedly in principle to a formal contract and then refuse at the last moment to put it into legal form **BGE 140 III 200**. In that case the record was incomplete and the matter was remanded **BGE 140 III 200** . Liability has been affirmed on other facts. An insurer that knew the insured needed comprehensive cover for a leased vehicle, but issued

an insurance certificate without disclosing that it would refuse that cover, was liable; negligence suffices **5C.85/2004**. The Ticino Court of Appeal held a buyer liable who had created a legitimate expectation of a sale, had substantial alteration works carried out and then withdrew without valid reasons. The cost of the works, professional fees and the notary's fee were awarded as negative interest **12.2013.142**.

Trust-based liability generalises these principles. In the Swissair case the Federal Supreme Court held that a parent company's statements could create a special legal relationship comparable to negotiations, "aus der sich auf Treu und Glauben beruhende Schutz- und Aufklärungspflichten ergeben" (from which duties of protection and disclosure based on good faith arise) **BGE 120 II 331**. The conditions are strict, and the doctrine does not make the parent jointly liable for the subsidiary's debts **BGE 120 II 331**. BGE 142 III 84 stresses the outer limit. Trust liability must not expand into liability towards everyone; it does not protect a person who is merely the victim of his or her own carelessness. An ISO certificate created no concrete expectation that investors would be repaid **BGE 142 III 84**. The Vaud Cantonal Court applied the same restrictive approach and found that mere advertising of group membership did not create concrete and specific expectations **CACI pt16-023018-48/2021**.

Adaptation for changed circumstances (clausula rebus sic stantibus)

Contracts must be performed as agreed. A judicial adaptation against a party's will is possible only where circumstances change so fundamentally after conclusion that a grave disturbance of equivalence arises, and only if the change was neither foreseeable nor avoidable **4A_158/2024**. The remedy is subsidiary. The court first looks for a contractual or statutory allocation of the risk. Only where none exists does it turn to the hypothetical will of the parties and ask "was die Parteien nach dem Grundsatz von Treu und Glauben vereinbart haben würden" (what the parties would have agreed under the principle of good faith) **BGE 127 III 300**. In BGE 127 III 300 the unforeseeable rezoning of building-right land into a reserve zone justified adaptation by way of termination on a rent date **BGE 127 III 300**.

The COVID-19 decisions show how rarely the conditions are met. In 4A_158/2024 the Court accepted that the pandemic measures were unforeseeable. It nevertheless found no grave disturbance of equivalence for a hotel lease, given reduced operating costs, state hardship payments, ordinary business risk and the short affected period. The lease had first been interpreted under the reliance principle as giving no guarantee of hotel use or turnover **4A_158/2024** . For a contract concluded on 18 February 2020, by contrast, the measures were already foreseeable. The party could have negotiated an adaptation clause and had kept performing after the first restrictions, so the clausula was excluded **4A_615/2025**. Procedurally, the judge deciding provisional release of a debt-enforcement objection lacks competence to adapt a contract. A clausula argument therefore cannot make the debtor's release immediately plausible under Art. 82 para. 2 SchKG **4A_257/2025**.

The test of manifest abuse (para. 2)

Restrictive application on the concrete facts

The leading formulation is constant. Manifest abuse "demeure toujours réservé" (always remains reserved); the court assesses it on the concrete circumstances; and the word "manifest" shows that abuse must be admitted restrictively **BGE 143 III 279**. The same formula appears in BGE 140 III 583 **BGE 140 III 583** and in 4A_303/2017 **4A_303/2017**. The Federal Supreme Court reserves Art. 2 para. 2 CC for clear, obvious cases **5A_782/2025**. In BGE 69 II 102 it said that formal law may be disregarded only where the abuse is obvious, "nicht auch im Zweifelsfall" (not also in case of doubt) **BGE 69 II 102**. For absolute rights in particular, such as ownership, the formal right is to be protected in case of doubt **5A_891/2017**.

Individual correction, not a categorical exception

Paragraph 2 "does not generally set aside the provisions of civil law for certain types of cases, but merely directs the court to take account of the special circumstances of the individual case" ("setzt nicht allgemein für bestimmte Arten von Fällen die Bestimmungen des Zivilrechts ausser Kraft, sondern weist das Gericht bloss an, den besonderen Umständen des Einzelfalls Rechnung zu tragen") **5A_782/2025**. The seizure cases mark the line. The Vaud cantonal court refused to use Art. 2 CC to make the income listed in Art. 92 para. 1 no. 9a SchKG seizable whenever it exceeds the subsistence minimum, because that would amount to setting the statute aside **CPF fa12-040976-11/2013**. The Federal Supreme Court in 5A_536/2019, by contrast, held a debtor's reliance on the absolute unseizability of his AVS pension manifestly abusive on the individual facts of the case (discussed under abusive reliance on unseizability below) **5A_536/2019**. In each case the court must also reconcile the application of Art. 2 para. 2 CC with the legislative purpose of the substantive norm at stake **4A_529/2017**.

No requirement of fault or intent to harm

Abuse is judged objectively. The prohibition "ne suppose pas que celui qui abuse de son droit ait l'intention de nuire" (does not presuppose that the person abusing the right intends to harm) **5A_536/2019**. For contradictory conduct, no fault is required: it is enough that the conduct, interpreted normatively, aroused legitimate reliance that is then disappointed **5A_536/2019 BGE 140 III 481**. In the same way, a limitation defence may be abusive even without bad intent **4A_303/2017**.

The typical case groups

The case law lists "cas typiques" (typical cases): exercising a right without any interest, using a legal institution contrary to its purpose, manifest disproportion of interests, exercising a right without consideration, and contradictory conduct **BGE 143 III 279 4A_573/2016**. BGE 135 III 162 presents these as guidance. Abuse is determined on the concrete circumstances "en s'inspirant des diverses catégories mises en évidence par la jurisprudence et la doctrine" (drawing on the various categories identified by case law and doctrine) **BGE 135 III 162**. The decisions do not expressly declare the list closed. Their wording ("typical", "drawing on") supports treating the groups as aids to subsumption rather than as an exhaustive catalogue.

Special rules, neighbouring institutions and international cases

Art. 2 CC is not a general fairness control

Art. 2 CC does not allow the court to rebalance a valid bargain. In BGE 115 II 232 a neighbour had been paid CHF 84,000 to withdraw building appeals, and the lower court had reduced the amount under Art. 2 CC. The Federal Supreme Court reversed. Value disparity is "abschliessend vom Übervorteilungstatbestand des Art. 21 OR erfasst" (exhaustively covered by the rule on unfair advantage in Art. 21 CO). Unlike Art. 19/20 CO and Art. 27 CC, Art. 2 CC sets no limit on freedom of contract, and neither good faith nor the prohibition of abuse exists to promote general contractual justice **BGE 115 II 232**. 4A_489/2023 confirms the exclusive character of Art. 21 CO, which leaves no room for a parallel review of immorality under Art. 20 CO. It adds that an imbalance arising only after conclusion is not an Art. 21 CO case **4A_489/2023**. Such a later imbalance can only be addressed, if at all, under the restrictive clausula doctrine discussed above.

Distinction from good faith under Art. 3 CC

Good faith under Art. 3 CC concerns knowledge: a person is in bad faith who acts in full awareness of the wrong or could not have been in good faith with the attention the circumstances required. Abuse under Art. 2 CC is a separate assessment of conduct **5A_655/2010**. The two interact. In 5A_655/2010 a neighbour who knowingly built an underground encroachment was in bad faith under Art. 3 CC, and for that reason could not invoke the owner's alleged abuse of rights to resist removal **5A_655/2010**.

Displacement by special rules

Where the legislature has concretised the prohibition of abuse in a special rule, that rule may govern both the elements and the consequences. For lease terminations, Art. 271 CO is a lex specialis to Art. 2 para. 2 CC. The tenant must challenge even an obviously abusive notice within the 30-day forfeiture period and cannot raise abuse later in eviction proceedings **4C.372/2006**. A manifestly abusive notice is therefore not void but only voidable **4A_31/2013**.

Employment law follows a different model. The list in Art. 336 CO is not exhaustive. It "concrétise avant tout l'interdiction générale de l'abus de droit" (primarily concretises the general prohibition of abuse), so other situations of comparable gravity also qualify. The consequence nevertheless remains an indemnity, not invalidity **BGE 131 III 535**. The Federal Supreme Court has accordingly examined a dismissal under Art. 2 CC independently of the cases listed in Art. 336 CO, and in that case found no abuse **4C.388/2006**.

Where no special rule exists, Art. 2 para. 2 CC applies directly. The Neuchâtel cantonal court held that, because Art. 271 CO does not apply to agricultural leases and the LBFA has no equivalent, Art. 2 para. 2 CC is the last safety net, though with a particularly narrow scope **CACIV.2020.9**. A vineyard tenant's upkeep had been uneven, so the notice was not manifestly abusive **CACIV.2020.9**. The Zurich High Court, by contrast, held an agricultural-lease termination abusive. The landlords had for years tolerated the tenants living provisionally on the farm, while themselves prolonging that situation, and then gave notice when the tenants replaced a decrepit caravan with a sturdier container. The stated ground was a pretext **NG120006**.

Mandatory application in international cases

Art. 2 para. 2 CC is a mandatory rule within the meaning of Art. 18 PILA. Whether the exercise of a right is abusive is therefore judged under Swiss law, whatever law governs the merits, provided there is a sufficient connection with Switzerland **4C.36/2000**. In 4C.36/2000 a bank guarantee was governed by Yugoslav law. The claimant had its seat in Switzerland, and the bank's telexes promising payment once sanctions eased made its later limitation defence abusive **4C.36/2000**. In international arbitration the provision operates only through the narrow review of an award's result for incompatibility with substantive public policy under Art. 190 para. 2 lit. e PILA **4A_346/2020**.

Contradictory conduct (venire contra factum proprium)

Reliance as the decisive element

Contradictory conduct as such does not make the exercise of a right abusive. There is "no principle of being bound by one's own conduct". A change of position breaches good faith only where the earlier conduct created protectable reliance which the new conduct would disappoint, and where the relying party has made dispositions that now prove detrimental **4A_601/2020**. No fault is required (see above). BGE 86 II 417 shows the classic consequence. A father had himself arranged a purchase-right transaction for his daughter and, once the market improved, invoked a statutory pre-emption right to obtain a better sale. Such contradictory exercise entails "die Ungültigkeit der Rechtsausübung, die Verwirkung des Anspruchs" (the invalidity of the exercise of the right, the forfeiture of the claim) **BGE 86 II 417**.

Mere tolerance does not create such reliance. Neighbours who had put up with non-compliant boundary trees for more than 30 years could still demand that they be cut back. Waiting, without special trust-building circumstances, is neither abuse nor implied consent **5A_719/2022**. The Ticino Court of Appeal reached the same result for an easement against tall plantings enforced only after decades: "Una semplice tolleranza, anche per anni, configura da sé sola mera compiacenza" (mere tolerance, even for years, amounts in itself to mere indulgence) **11.2002.145**.

Invoking a form defect

The largest group of cases concerns parties who rely on the nullity of a contract for lack of form (Art. 11 para. 2 CO, notably Art. 216 CO). The Federal Supreme Court must notice such nullity ex officio. The abuse bar can nevertheless prevent that result **4A_573/2016**. Invoking the defect is barred where the party doing so has acted contradictorily, in the sense of creating a legitimate expectation in the other party or at least placing it in a position worthy of protection **4A_573/2016**. Voluntary performance carries particular weight. Abuse is generally found where the contract has been fully performed on both sides, and also where it has been performed only partly, provided the main obligations have been performed ("in der Hauptsache") and performance began voluntarily **4A_573/2016**. In special circumstances abuse may be found even without any act of performance **4A_573/2016**. Separately, a party behaves abusively if it pursues an aim foreign to the purpose of the form requirement **4A_573/2016**.

In 4A_573/2016 these strands combined. The seller of real estate had actively cooperated after the promise of sale, had raised no objection to the surveyor's final plan and then suddenly withdrew to escape her obligations for reasons unrelated to the form requirement. Her plea of nullity was abusive **4A_573/2016**. In BGE 104 II 99 the seller had himself devised an understated price (a secret "black payment") to save public charges and knowingly let the buyer build before transfer. Using the form defect to extract the unpaid black payment was an abuse of right **BGE 104 II 99**.

Knowledge is the limiting condition. Performance must have been voluntary and free of error ("irrtumsfrei"); a party who concluded and performed the contract without knowing of the defect does not abuse its right by later invoking it **4C.225/2001**. The plea is also not barred where the form serves a higher public interest **4C.175/2003**. In 4C.175/2003 the parties had partly performed a GmbH share transfer in ignorance of the notarial-form requirement, and the defendant invoked the defect as soon as he learned of it. The plea was admissible **4C.175/2003**. The burden of proving knowledge lies on the party opposing nullity. In 4C.225/2001 the cantonal court breached Art. 8 CC by inferring the deceased seller's knowledge from the absence of proof of her ignorance, and the heir's nullity action had to be granted **4C.225/2001**. Under BGE 87 II 28 the person invoking nullity need show no particular interest, while the opponent must prove special circumstances; performance alone is not enough **BGE 87 II 28**. The same principles extend to statutory written-form requirements outside real-estate law. The Valais cantonal court held it abusive for a hirer who had knowingly accepted the services, paid the invoices and signed the timesheets to invoke the nullity of a staff-leasing contract for lack of written form **C1 07 47**.

Invoking mandatory protective rules

A weaker party who invokes a mandatory protective rule against an agreement it once accepted is not, as a rule, abusing a right. BGE 135 III 162 states that such contradictory conduct is abusive only if particular conditions are met, "spécialement en matière de contrat de travail" (especially in employment contracts), because otherwise the mandatory protection of the worker may prove illusory **BGE 135 III 162**. In 4A_341/2012 the employee had agreed to vacation pay being included in salary and later invoked the invalidity of the arrangement within the limitation period. Without further special

circumstances this was not abusive; otherwise Art. 2 para. 2 CC would deprive the worker of the protection offered by mandatory law **4A_341/2012**.

Special circumstances can tip the balance, and the result may differ claim by claim. In 4A_304/2021 an employee had for years accepted salary increases and higher bonuses without ever claiming overtime and raised the claim only after termination. His contractual overtime claim under Art. 321c CO was abusive. His claim for statutory extra-work pay under Art. 13 of the Labour Act was not, because that rule cannot be waived and his silence "ne saurait dès lors avoir une quelconque portée juridique" (could therefore have no legal significance at all) **4A_304/2021**. The Bern High Court treated an executive as a special case. He was managing director, main shareholder and board member, could order his own overtime and let the balance be reset to zero each year without objection. The protective purpose of Art. 341 CO applied to him with less force, and his late overtime claim was forfeited **ZK 2008 581**.

Tenancy law follows the same pattern for the official form on the initial rent. A tenant can in principle always invoke its absence, subject to abuse, which is to be assumed restrictively and on all the circumstances **4A_83/2022**. Paying the rent for a long time without protest is not enough by itself **BGE 140 III 583**. Abuse may be found where the tenant noticed the defect and kept silent in order to profit from it later, or expressly and knowingly waived the form and voluntarily performed the agreement **BGE 140 III 583**. In 4A_83/2022 a legally trained tenant had performed the lease voluntarily and without error for 13 years. He raised the defect only after rent-reduction negotiations with a new owner failed, and had thus kept a known defect "in Reserve" (in reserve). Both his repayment claim and his claim for judicial fixing of the initial rent failed **4A_83/2022**. The relevant knowledge is actual, not constructive, and a tenant who acts within the one-year period for the enrichment action is not abusive merely for not protesting earlier **4A_254/2016**. Vaud tenants who filed for conciliation one week after learning of the consequences of the missing form acted without any abuse **CACI xa12-046008-309/2014**.

Delay, limitation and forfeiture by inaction

Mere delay within the limitation period

Waiting to exercise a right within the statutory limitation periods is in general not an abuse. Special circumstances must make the exercise of the right appear irreconcilable with the holder's earlier inaction. Examples are recognisable detriment to the obligor where earlier assertion would have been reasonable, or waiting in order to gain an unjustified advantage **4A_194/2013**. An employee who asserts overtime claims only at the end of the employment relationship does not thereby act abusively **4A_194/2013**. The same applies in public employment. A police officer who had repeatedly challenged her initial salary could not be refused a hearing for lateness, because "le simple fait de tarder à faire valoir son droit en justice ne constitue pas un abus de droit" (merely delaying to assert one's right in court is not an abuse of right) **8C_639/2013**. The cantonal court was bound by that holding on remand and granted the salary increase for the period not time-barred **A1 14 279**. In corporate law, mere passage of time likewise raises no presumption that a shareholder's information action is abusive, and no forfeiture period applies **4C.234/2002**.

Where special circumstances exist, forfeiture follows. The Bern High Court formulated three conditions: earlier assertion was reasonable, the debtor legitimately relied on no further claim being made, and the delay caused the debtor unfair prejudice **ZK 2008 581**. For distinctive signs the Federal Supreme Court requires long tolerance without objection, a valuable position of the infringer's own and, in principle, knowledge of the infringement. Negligent failure to watch the market for conflicting signs can suffice, but a merely larger position of the infringer cannot **BGE 117 II 575**.

Abusive reliance on limitation

A debtor abuses the limitation defence not only by cunningly inducing the creditor not to act in time. It is enough that the debtor, even without bad intent, behaves in a way that induces the creditor to refrain from legal steps during the limitation period, and that this inaction appears understandable on an objective view **4A_303/2017**. Causation between the debtor's conduct and the creditor's inaction is required, but the conduct need not amount to an acknowledgment of debt **4A_303/2017**. In 4A_303/2017 an architect had expressly discouraged litigation and promised to solve a damp problem, and an unrepresented owner reasonably relied on him; the limitation defence was abusive **4A_303/2017**.

Passivity does not suffice. In an inheritance partition, the co-heirs' mere passivity, joint sales of parcels and occupation of the house did not make their limitation defence abusive. The lapse of time is neither a waiver nor abusive exercise of a right **5A_656/2023**. In BGE 69 II 102 repeated promises to repay, combined with a plea of lack of funds, interrupted limitation as an acknowledgment "aber nichts weiteres" (but nothing more). The result would have differed only if the debtor had expressly asked the creditor to wait and promised payment by a date after the limitation period **BGE 69 II 102**.

Lack of interest, disproportion, misuse of institutions and circumvention

Exercise without a legitimate interest or with gross disproportion

Absolute rights are exercised without having to justify an interest. In 5A_655/2010 a cantonal court had refused removal of an underground concrete backfill because it caused the owner no visible disadvantage and removal would be costly. The Federal Supreme Court reversed: defending one's ownership is a legitimate and therefore sufficient interest, and exact restoration of the boundary is a legitimate interest even for a small area **5A_655/2010**. A gross disproportion of interests remains conceivable for disturbances of property, but it is applied very restrictively **5A_655/2010**. A neighbour enforcing cantonal setback rules for trees need prove no special interest and need not accept a balancing of interests **BO.2015.34**.

The cases in which removal was refused combine several factors. In 5C.68/2001 removal of a sewer pipeline was not required by justified interests, since the planned parking could still be built. It had also been laid with the owner's consent in return for a free connection, and she had tolerated it for five years **5C.68/2001**. The Obwalden High Court refused removal of a retaining wall that crossed the boundary by a few centimetres. The claimant had tolerated it for over 40 years, his own wall stood close to the boundary, and removal would bring him no advantage while costing the defendants. A bad-faith encroacher generally cannot invoke the owner's abuse; the court admitted an exception where tolerance extended far beyond the period of acquisitive prescription **OGVE 2018/19 Nr. 3**. In neighbour law, abuse may also arise where the holder, without objective reason, chooses among equivalent options the one that causes particular disadvantage to the other party **5A_852/2021**.

Use of an institution contrary to its purpose

A legal institution is misused where it is invoked to serve interests it is not meant to protect **4A_573/2016**. 4A_277/2020 shows how sharply the line is drawn. A data-access request under the former Data Protection Act, made solely to assess litigation prospects, was a manifest abuse and was dismissed, because the access right serves the protection of personality **4A_277/2020**. BGE 138 III 425, by contrast, holds that a request made with a view to a damages action is not abusive per se. Verifying the accuracy of one's own data is legitimate even if it also helps prepare litigation; abuse would require that the request serve solely to sound out the opponent and obtain evidence otherwise unavailable **BGE 138 III 425**. Under the revised

Act, the Federal Administrative Court ties the refusal ground in Art. 26 para. 1 lit. c FADP to Art. 2 para. 2 CC. It upheld a refusal where the requests aimed at a criminal defence and at a FINMA proceeding to which the applicants were not parties **a-1251-2024**. The Thurgau High Court held that an insurer's wish to preserve a procedural surprise is not an overriding interest against disclosing surveillance files **RBOG 2013 Nr. 09**.

A purpose-foreign motive alone does not suffice. The Lucerne cantonal court granted the joint divorce of a couple married for 57 years who wanted to obtain two individual old-age pensions while continuing to live together. Their wish to dissolve the marriage as a legal institution was genuine, the divorce was not manifestly contrary to its purpose, and preventing such outcomes is for the legislature **3B 16 29**.

Circumvention of the law

Circumvention of the law (fraude à la loi) is "forma particolare dell'abuso di diritto" (a particular form of abuse of rights). It exists where a person avoids a rule imposing or prohibiting a result by relying on another provision that achieves the same result in an apparently lawful way. The evaded rule then applies notwithstanding the construction, but the abuse must be manifest **1C_916/2013**. In 1C_916/2013 there were concrete signs that a house approved as a primary residence would be used as a second home, but no manifest abuse. The Court did not annul the permit; it required a land-register note "abitazione primaria" as a proportionate safeguard **1C_916/2013**. The Graubünden administrative court, on different facts, annulled second-home permits outright. It found purchase-promise and lease conditions ineffective given the insufficient demand for first homes **PVG 2018 25**.

In family law, a request for a change of name under Art. 30 para. 1 CC was used "à des fins détournées" (for diverted purposes) to obtain the double surname that Art. 160 CC prohibits for married persons. It was inadmissible without examining legitimate reasons **5A_143/2023**. In tenancy law, chains of fixed-term leases are lawful in principle, subject to fraude à la loi. The tenant who wishes the evaded rule to apply bears the burden of proving it, and the landlord need not justify a special interest in fixed terms **4A_609/2012**.

Shareholder rights

Corporate law codifies part of the case law. Art. 706 para. 2 CO is only a codification of earlier case law and its cases are applications of Art. 2 CC. A majority resolution is abusive if it is not justified by reasonable economic grounds, manifestly harms the minority and favours the majority without reason. On that basis an amendment cutting the minority's board seats from four to one was annulled **4A_416/2022**. The right to have a general meeting convened under Art. 699 CO is likewise subject to Art. 2 para. 2 CC. A shareholder who sought a meeting to have himself appointed sole director and end the company's proceedings against him was refused, as he had no legitimate interest and was using the institution contrary to its purpose **4A_529/2017**. An information request used about two years after the shareholder learned the facts, to pressure the board over a director's removal, was abusive **4A_36/2010**. For the special audit, by contrast, the Graubünden cantonal court set a high threshold to protect minorities. It found no abuse where the company had answered questions only late or partially **PKG 2004 22**.

Piercing the corporate veil

A company and its sole shareholder are in principle treated as distinct legal subjects, even where they are economically identical **4A_58/2011**. Piercing the veil, which rests on Art. 2 para. 2 CC, requires two cumulative elements: identity of persons in economic reality or at least economic domination of one subject by the other, and an abusive invocation of the duality in order to gain an unjustified advantage **4A_58/2011 5A_205/2016**. In 4A_58/2011 the shares were split between the defendant and his wife, and no abuse was shown. The doctrine also may not be used to bypass the procedure the claimants should have followed, namely re-registration of the dissolved company **4A_58/2011**.

In enforcement, legal ownership is normally decisive **5A_205/2016**. Piercing is therefore exceptional, and reverse piercing in particular calls for special restraint. Identity of economic interests alone is not enough. The abuse element requires an accumulation of different and extraordinary conduct amounting to real machinations and qualified harm to third parties **5A_797/2023**. A long personal relationship with the company's sole director, occupation of its apartment and alleged non-payment of rent lacked a further qualifying element **5A_650/2024**. The cantonal court whose decision was affirmed in that case added that piercing does not fail merely because the debtor is neither shareholder nor officer of the company **KSK 2023 114**. In 5A_557/2024, conversely, the Federal Supreme Court accepted on a prima facie standard that a debtor dominated companies through family relationships. Their independence appeared to be invoked only to evade enforcement. Domination need not rest on holding all or most of the shares **5A_557/2024**. Where the conditions are met, reverse piercing allows assets formally owned by the company to be seized for the debtor's debts. In 5A_205/2016 they were seized to secure maintenance contributions **5A_205/2016**.

Marriage, divorce and seizure protection

Pension splitting on divorce

Pension splitting may be refused beyond the statutory ground of Art. 123 para. 2 CC only where splitting would breach the prohibition of manifest abuse in a case comparable to the statutory grounds. Examples are a sham marriage, or a marriage that was never lived or in which no common household was ever set up. For other grounds of refusal "bleibt hingegen kein Raum" (there is no room) **BGE 133 III 497**. Conduct contrary to the duties of marriage does not, as a rule, amount to manifest abuse **BGE 133 III 497**. Only particularly shocking situations justify refusal. In 5A_694/2018 a sham marriage at the time of the wedding was not proven. Even if the husband had kept the marriage alive mainly to obtain naturalisation, that would be relevant primarily to migration law and would not remove his entitlement to share in the pension assets **5A_694/2018**. The Neuchâtel cantonal court refused splitting where the husband had never intended a real marital community and had used the marriage to settle in Europe **CC.2009.52**.

Sham marriages in migration law

Migration law has its own statutory abuse rules. Art. 51 AIG extinguishes residence claims asserted abusively, in particular by means of a sham marriage. The abuse must be obvious. It suffices that one spouse lacks the will to form a lasting community, but a marriage is not a sham merely because migration motives were decisive **2C_584/2024**. A sham marriage may not be assumed lightly. The migration authorities bear the primary burden of proof, but once weighty indications exist the spouses must substantiate genuine marital intent **2C_187/2025**. These decisions rest on Art. 51 AIG, not on Art. 2 CC. The Federal Supreme Court has likewise treated the abuse concept under the free-movement agreement autonomously, requiring obvious abuse supported by clear indications **2C_71/2016**.

Abusive reliance on unseizability

The seizure cases show that statutory protection of the debtor can itself be invoked abusively. In 5A_536/2019 the debtor had used his other assets and pension capital for his new wife and then invoked the absolute unseizability of his AVS pension against the maintenance he had agreed to pay. This was manifestly abusive and the pension was seized **5A_536/2019**. Where the debtor did not lead a lavish lifestyle thanks to a spouse, as with a couple's disposable income of CHF

2,115.10, the pension remained unseizable **5A_926/2017**. As shown above, a general rule making such income seizable is excluded **CPF fa12-040976-11/2013**.

Debt enforcement and civil procedure

Abusive debt enforcement

Initiating debt enforcement does not depend on proving the claim, and enforcement authorities may not assess whether the claim is well-founded **BGE 140 III 481**. A debt enforcement is therefore void for abuse only exceptionally: where the creditor obviously pursues aims "die nicht das Geringste mit der Zwangsvollstreckung zu tun haben" (that have nothing whatsoever to do with enforcement). Examples are merely damaging the debtor's creditworthiness or vexatiously enforcing a wildly excessive amount **BGE 140 III 481**. In BGE 140 III 481 the creditor had promised during settlement talks to withdraw an earlier enforcement, then filed a second request three days before the court hearing. This was contradictory and abusive. The enforcement office may replace its void decision once it learns the true facts, and while a complaint is pending it may do so until its response (Art. 22 para. 2 SchKG) **BGE 140 III 481**. A CHF 300 million unsubstantiated enforcement filed as an apparent act of revenge was void **5A_588/2011**. By contrast, enforcement is a statutory means of interrupting limitation. It is in principle not abusive even when directed against several possibly liable persons **5A_563/2018**. Where an attachment itself constitutes a manifest abuse, meaning conduct absolutely incompatible with good faith, the enforcement office must refuse to execute it **BGE 143 III 279**.

Good faith in procedure and partial actions

Since 2011, Art. 52 CPC has required litigants to act in good faith. In civil procedure its scope is the same as that formerly given to Art. 2 paras. 1 and 2 CC **4A_485/2012**. Partial actions under Art. 86 CPC are permissible, and using one to obtain the advantages of a particular procedure or jurisdiction is in principle not abusive. The limit is set by Art. 2 para. 2 CC and Art. 52 CPC **4A_307/2021**. An employee who filed four partial actions, together exceeding CHF 100,000, to stay within the cost-free simplified procedure for disputes up to CHF 30,000 used the institution contrary to its purpose. Transfer to the ordinary procedure was upheld **4A_307/2021**. The Zurich High Court treated five identical partial claims of CHF 29,900 out of CHF 726,386, filed within seven months after a test case had succeeded, as strong indications of abuse. It joined the cases and declined to hear them **NP260006**. In 4A_485/2012 a late conciliation request in a tenancy dispute was not abusive, because conciliation could still serve its purpose and could not block the landlord's eviction action **4A_485/2012**. Late objections are also constrained: objections to procedural prerequisites belong in the first pleadings, even though those prerequisites are examined ex officio **5A_347/2018**.

Querulous and abusive filings

Under Art. 132 para. 3 CPC querulous and abusive filings may be returned without further action. They "vermögen ein Verfahren weder zu eröffnen noch weiterzuführen" (can neither open nor continue proceedings) **4D_74/2023**. The return is not an appealable decision. The only remedy is a complaint for denial of justice, which succeeds only if the filing was wrongly classified as querulous or abusive **4D_74/2023**. The Zurich High Court confines the rule to exceptional cases of obviously querulous or grossly abusive filings. In case of doubt the filing is to be treated as merely improper and a period for correction granted, and abuse cannot be presumed even for known querulous litigants **RU130033**. A returned filing is procedurally treated as not made, and challenging the return is by complaint under Art. 319 lit. c CPC **PS250371**.

Public law

The Federal Insurance Court applied Art. 2 CC directly in social insurance. Investors who joined a limited partnership solely to obtain AHV coverage and pension returns systematically undermined the solidarity on which the AHV rests, and their affiliation was refused for abuse **BGE 131 V 97**. Other public-law fields apply the concept on their own terms (see the migration cases above). Cantonal practice requires conduct rather than a mere state of facts. Separation and criminal proceedings alone did not make a permit renewal abusive **TA.1995.329**. Abuse by the private party must be kept apart from the protection of legitimate expectations against the State. That protection rests on constitutional law and has its own conditions **2C_107/2025**.

Consequences of abuse

The consequence of paragraph 2 is that the abusive exercise of the right receives no protection; the right is not converted into a different one. Where the plea of a form defect is abusive, the form defect "ist im Verhältnis unter den Parteien unbeachtlich" (is to be disregarded as between the parties), and the legal position created by performance stands **BGE 104 II 99**. Performance of the contractual obligations can then no longer be called into question **4A_573/2016**. The Valais court even granted a claim for the balance of the price instead of the enrichment claim that would ordinarily follow from nullity **C1 07 47**. For contradictory exercise of a pre-emption right, BGE 86 II 417 speaks of forfeiture of the claim **BGE 86 II 417**. Where abuse is not established, nullity runs its ordinary course. In BGE 87 II 28 restitution of payments and release from the mortgage debts assumed were ordered against reconveyance of the land **BGE 87 II 28**.

The sanction extends only as far as the abuse. In 4A_304/2021 abuse barred the contractual overtime claim but not the mandatory statutory claim for extra work **4A_304/2021**. In interim proceedings the Ticino Court of Appeal held that a call on a performance bond was abusive only above the residual debt. The bank was ordered not to pay more than USD 11,860.95, and payment within that limit was not abusive **12.2007.72**. Where a special rule concretises abuse, its own consequence governs: voidability within a forfeiture period for lease terminations, and an indemnity for dismissals (see above).

Ex officio application, burden of proof and review

Ex officio application on the facts established

Every instance must apply the prohibition of abuse ex officio, including in enforcement proceedings **5A_782/2025 BGE 131 V 97**. A court that relies on it need not warn the parties beforehand: Art. 29 para. 2 Cst. confers no right to be informed in advance of the intended reasoning, at least where the relevance of Art. 2 para. 2 CC was foreseeable on undisputed facts **5A_782/2025**. Ex officio application concerns the law, not the facts. Under the principle of production of evidence (Art. 55 para. 1 CPC) the parties must allege the facts on which they rely, and taking evidence does not replace missing allegations **4A_601/2020**. The Aargau High Court, in a case not concerning abuse, considered a defence ex officio only where the necessary facts were before it, and barred payment facts raised for the first time on appeal **AGVE_2004_9**. The decisions do not state this in terms for Art. 2 para. 2 CC, but its reasoning suggests that abuse can be found only on facts properly introduced into the proceedings.

Burden of proof

The party relying on abuse must establish the particular circumstances that justify the exception **BGE 135 III 162 5A_852/2021**. The form-defect cases apply this strictly to proof of the other side's knowledge **4C.225/2001**, and in fraude à la loi the burden lies on the party seeking application of the evaded rule **4A_609/2012** (see the sections on form defects and circumvention above). The Neuchâtel court rejected a retaliation argument because the tenant failed to prove the motive. A further fact that had not been expressly alleged was treated as not proven **CACIV.2020.9**.

Standard of review

The circumstances for or against abuse are questions of fact; whether they amount to abuse is a question of law **5A_655/2010**. The Federal Supreme Court decides abuse case by case on all the circumstances, and reviews the cantonal assessment on the facts binding upon it **4A_83/2022**. Where the appeal is limited to constitutional grievances, as for interim measures under Art. 98 BGG, the misapplication of Art. 2 para. 2 CC cannot be raised as such, because the prohibition of abuse is not a constitutional right **5A_929/2016**. Review is then confined to arbitrariness **5A_655/2010**. The arrest and piercing decisions were accordingly decided only on whether the cantonal assessment was arbitrary **5A_797/2023 5A_557/2024**.

Practical implications

- A party relying on abuse must plead and prove the specific circumstances: knowledge of a defect, assurances given, reliance and dispositions made, or the purpose actually pursued. Long passivity, long performance or a weaker party's change of mind will rarely suffice on its own **BGE 135 III 162 4A_194/2013**.
- Where a special rule concretises the prohibition of abuse, its deadlines and consequences govern. An abusive lease termination must be challenged within 30 days; it cannot be attacked later under Art. 2 CC **4C.372/2006**.
- Creditors facing delaying assurances should interrupt limitation or obtain an express waiver rather than rely on Art. 2 para. 2 CC, which requires conduct causing the inaction **5A_656/2023**.
- In negotiations for a form-bound contract, an agreement in principle followed by a last-minute refusal can trigger liability for the negative interest. Parties wishing to remain free should say so expressly **BGE 140 III 200**.
- On appeal to the Federal Supreme Court, factual findings on knowledge and reliance are binding. The decisive record must therefore be built before the cantonal courts **5A_655/2010**.